

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| AGRICULTURAL INSURANCE COMPANY, | : | |
| | : | CIVIL ACTION |
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| Plaintiffs, | : | |
| | : | |
| v. | : | NO. 00-CV-2114 |
| | : | |
| EARL SCOTT, ACTION TRUCKING, INC., | : | |
| PRESIDENTIAL EXPRESS TRUCKING and | : | |
| CGU MID-ATLANTIC, | : | |
| | : | |
| Defendants. | : | |
| | : | |

MEMORANDUM

ROBERT F. KELLY, J.

MARCH 14, 2001

Presently before this Court is the Motion for Summary Judgment filed by Agricultural Insurance Company ("AIC") and the Cross-Motion for Summary Judgment filed by Action Trucking, Inc. ("Action"). AIC seeks summary judgment on its Complaint for Declaratory Relief claiming that it owes no duty to defend or indemnify Action's employee, Earl Scott ("Mr. Scott"), in the underlying civil suit captioned Cheryl Kenner v. Presidential Express Trucking, Earl Scott, City of Philadelphia, and George and Margaret Garhart, Philadelphia County, July Term, 1999, No. 2203. Action cross-moves for summary judgment claiming that it is also not liable to Cheryl Kenner ("Ms. Kenner"), the plaintiff, in the underlying civil suit. For the following reasons, AIC's Motion for Summary Judgment is denied and Action's Cross-Motion for Summary Judgment is denied.

I. BACKGROUND

On October 29, 1997, Action entered into a thirty day, automatically renewing lease with Presidential Express Trucking ("Presidential") under which Presidential leased a 1993 Peterbilt tractor and engaged Action's employee, Mr. Scott, to drive the tractor. Under the terms of the lease, Presidential was to maintain trucking insurance on the leased tractor and Action was to maintain non-trucking, or bobtail¹, insurance on the tractor. Presidential obtained trucking insurance through CGU Mid-Atlantic ("CGU") and Action obtained bobtail insurance through AIC. Presidential's trucking insurance policy insured the tractor while it was hauling cargo for Presidential and Action's bobtail insurance policy insured the tractor while the tractor was not being used to haul cargo, or while it was bobtail.

On June 15, 1998, Mr. Scott dropped off his trailer with Action after allegedly delivering a load of cargo and was driving the tractor home to where he garaged it. While driving, the smokestack of the tractor struck a tree branch causing the branch to break off and fall onto Ms. Kenner's vehicle causing her physical injury and property damage. On July 20, 1999, Ms. Kenner filed the underlying civil suit against Presidential and Mr. Scott among others. Presidential joined Action as an

¹ The term bobtail refers to a tractor to which no trailer is attached.

additional defendant in the civil suit. Action submitted the claims brought against it to CGU. CGU denied coverage, claiming that AIC was primarily responsible since it provided bobtail coverage and the tractor did not have a trailer attached to it at the time of the accident. Initially AIC declined coverage but then later assumed Action's defense and has maintained control over the defense up until the present time.

On April 24, 2000, AIC filed a Complaint with this Court seeking a declaratory judgment that AIC has no duty to provide non-trucking liability coverage for the civil suit and that CGU does have a duty to provide liability coverage. On January 17, 2001, AIC filed this present Motion for Summary Judgment. On January 29, 2001, Action filed the present Cross-Motion for Summary Judgment.

II. STANDARD

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and 'the moving party is entitled to judgment as a matter of law.'" Hines v. Consol. Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991)(citations omitted). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact. Big Apple BMW, Inc. v. BMW of N. Am. Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912

(1993).² Once the moving party has produced evidence in support of summary judgment, the non-movant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates that there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

III. DISCUSSION

All parties agree that the substantive law of New Jersey applies in this case. This case is based upon diversity jurisdiction and therefore the Court must apply the choice of law rules of the state in which it sits. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). Under Pennsylvania law, the interpretation of a contract is determined by the law of the place of contracting. Wood v. Nat'l Life & Accident Ins. Co., 347 F.2d 760, 763 n. 2 (3d Cir. 1965). Both Action and Presidential are New Jersey trucking concerns and the contract between them was entered into in New Jersey. Furthermore, the

² "A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, a dispute over a material fact must be 'genuine,' i.e., the evidence must be such 'that a reasonable jury could return a verdict in favor of the non-moving party.'" Compton v. Nat'l League of Prof'l Baseball Clubs, 995 F. Supp. 554, 561 n.14 (E.D. Pa. 1998) (citations omitted), aff'd, 172 F.3d 40 (3d Cir. 1998).

insurance policies issued by AIC and CGU both contain policy endorsements conforming the coverages provided to New Jersey law. Therefore, since New Jersey was the place of contracting and because New Jersey has the greatest interest in the outcome, this Court will apply New Jersey law.

A. AIC's Motion for Summary Judgment

AIC claims that an exclusion in the bobtail policy issued to Action specifically precludes their duty to defend in the underlying civil suit. The exclusion, under the heading "TRUCKING OR BUSINESS USE", states that the insurance does not apply to "[l]iability arising out of any accident which occurs while the covered auto is being used in the business of anyone to whom the covered auto is leased, rented or loaned or while the covered auto is being used to transport cargo of any type." Pl.'s Mot. for Summ. J., Ex. F., Non-Trucking Liability Policy at p. 5 (emphasis added). The phrase "in the business of anyone to whom the covered auto is leased, rented or loaned" is defined in the policy as including being "used for the purpose of traveling to or from any location where the covered auto is regularly garaged." Id. AIC claims that at the time of the accident, the tractor was being used in the business of Presidential, because it was leased to Presidential and it was traveling to the location where the tractor was regularly garaged. Therefore, AIC argues that the exception removes AIC's duty to defend and

summary judgment is appropriate.

There is, however, a genuine issue of material fact which precludes this Court from granting summary judgment to AIC based on the above exclusion to Action's bobtail insurance policy. It is undisputed that on June 10, 1998, five days prior to the accident, Mr. Scott took the tractor, picked up a load of cargo in Jersey City, New Jersey for Presidential, and delivered the cargo in Florida. However, there is a factual dispute whether, just prior to the June 15, 1998 accident, Mr. Scott brought a different load of cargo back from Florida for Action or for some third party other than Presidential. Presidential and CGU allege that Mr. Scott returned from Florida with a load of produce for another party other than Presidential, in a different trailer than the one he had driven to Florida. This allegation is based upon Mr. Scott's deposition and log records, and upon the deposition of Presidential's vice-president, William Sarnowski ("Mr. Sarnowski"). See Scott Dep. at 42-44; Sarnowski Dep. at 19. In light of these facts, it is entirely possible that the tractor was not being used in the business of the lessee, Presidential, at the time of the accident, but was being used by Action or by some other third party. In that event, the exclusion relied upon by AIC would not apply.

AIC replies that it does not matter if the return load of cargo from Florida had been brokered by Presidential or by

another trucking company. AIC contends that assuming that there was a return load, some trucking company must have leased, rented or loaned the tractor in order to haul the load north, and therefore the exclusion still applies. This argument does not hold up under scrutiny. Action is a trucking company; it is capable of brokering its own loads to be hauled in its own tractor-trailers. Therefore, while it is possible that Action leased the tractor to another trucking company who brokered the alleged return cargo load, it is as likely, if not more likely, that Action simply brokered the alleged return load itself. If that was the case, the exception which only applies if the covered auto is "leased, rented or loaned" would not apply. AIC, who has the burden of demonstrating the absence of any genuine issues of material fact, has not provided any evidence that the return load was, in fact, brokered by one who leased, rented or was loaned the tractor and not by the owner of the tractor, Action.

AIC also claims that although the tractor was technically bobtail, bringing the tractor back to the place where it is regularly garaged is within the scope of Presidential's trucking policy, and thus the accident should be covered under the trucking policy and not under Action's bobtail policy. AIC has not convinced this Court that the issue is so one-sided that AIC must prevail as a matter of law. Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 251-252 (1986). When interpreting insurance policies, the court grants a "broad reading of coverage provisions, narrow reading of exclusionary provisions, resolution of ambiguities in the insured's favor, and construction consistent with the insured's reasonable expectations." Search EDP, Inc. v. Am. Home Assurance Co., 632 A.2d 286, 289 (N.J. Super. App. Div. 1993), cert. denied, 640 A.2d 848 (N.J. 1994). Although AIC sites Guaranty Nat'l. Ins. Co. v. Vanliner Ins. Co., No. 97-3902, 1998 U.S. Dist. LEXIS 9505 (E.D. Pa. June 29, 1998) and Planet Ins. Co. v. Anglo Am. Ins. Co., 711 A.2d 899 (N.J. Super. App. Div. 1998), to support its argument, the facts of these cases are sufficiently different from the present case to leave room for doubt that the bobtail policy did not apply.

In Guaranty National, the court found that a bobtail tractor which was driven to the mall while waiting for its trailer to be loaded was still covered by the trucking insurance policy. Guaranty Nat'l., 1998 U.S. Dist. LEXIS 9505, at *10-*12. In the present case, Mr. Scott was not in the middle of a pick-up or delivery, but had completed his assignment. In Planet Insurance, the court relied on an exception similar to the one at issue in this case. However, unlike in the present case, there was no dispute as to whether the lessee was in control of the tractor at the time of the accident. Planet Ins., 711 A.2d at 900-901. Therefore, summary judgment cannot be granted in AIC's

favor because genuine issues of material fact remain regarding whether the exception to coverage in the bobtail insurance policy applies and whether the bobtail policy would or would not be triggered in this factual situation.

B. Action's Cross-Motion for Summary Judgment

Action claims that either Presidential and CGU are solely liable because the tractor was leased to Presidential at the time of the accident or, alternatively, that AIC does have a duty to defend under the bobtail policy and thus Action is not liable. Under the lease between Action and Presidential, Presidential was required to maintain trucking insurance on the leased tractor. Furthermore, the lease provided that, "[l]essee shall have the exclusive possession, control and use of the said equipment and shall assume full responsibility for the operation of the equipment for the duration of the lease." Def.'s Resp. to Pl.'s Mot. for Summ. J., Lease Agreement at ¶ 14. However, the lease also stated that,

[w]hen the equipment is not in actual use for the Lessee, the same shall bear no placard or other reference of any kind to the Lessee and Lessor agrees to indemnify Lessee and agrees to hold Lessee harmless from any acts or things resulting from or relating to the use of such equipment other than the use thereof directly for Lessee.

Id. at ¶ 2. Action alleges that the lease was in full effect at the time of the accident, that Presidential had exclusive possession, control and use of the tractor prior to and during

the time of the accident, and that the tractor bore Presidential's logo and Interstate Commerce Commission, or ICC, number. See Cox v. Bond Transp., Inc., 249 A.2d 579, 588 (N.J. 1969), cert. denied, 395 U.S. 935 (1969)(stating that the lessee's ICC number on a tractor creates a strong presumption that the lessee is responsible for the tractor's operation). Action further alleges that between June 9, 1998 and June 16, 1998, the tractor was not used on behalf of anyone other than Presidential and that the last load that Mr. Scott hauled prior to the accident was Presidential's load of cargo to Florida.

As stated above, many of these facts are in dispute. Action's assertion that no load of cargo was brought back from Florida is contrary to Mr. Scott's assertion that, acting under Action's orders, he attached a new trailer to the tractor and brought back a load of produce. Scott Dep. at 42-44. Also, Mr. Sarnowski testified in his deposition that upon the delivery to Florida, the assignment for Presidential was complete. Sarnowski Dep. at 19. Testimony also reveals that after completing deliveries for Presidential in Florida, Action would secure its own loads for the return trip. Sarnowski Dep. at 58; Scott Dep. at 44. Furthermore, Presidential alleges that both Presidential's and Action's ICC numbers were on the tractor. Presidential claims that the fact that Presidential's ICC number and logo were on the tractor at the time of the accident does not

establish that Mr. Scott was working for Presidential, but establishes only that Action was in violation of the lease by failing to remove Presidential's logo from the tractor while the tractor was hauling cargo for someone other than Presidential. See Def.'s Resp. to Pl.'s Mot. for Summ. J., Lease Agreement at ¶ 2. Presidential notes that in Cox the court recognized that the presumption of responsibility arising from the presence of the lessee's logo and ICC number on the tractor occurs only when the operation of the tractor "is in any way with the knowledge and for the benefit of the carrier." Cox, 249 A.2d at 589; see also Moore v. Nayer, 729 A.2d 449, 455 (N.J. Super. App. Div. 1999), cert. granted, 741 A.2d 99 (N.J. 1999), appeal dismissed 752 A.2d 1289 (N.J. 2000)(stating that the presumption of responsibility arising from ICC numbers is rebuttable).

Furthermore, Action's reliance on Cox, 249 A.2d 579, Planet Ins., 711 A.2d 899, and Felbrant v. Able, 194 A.2d 491 (N.J. Super. App. Div. 1963) is not on point. These cases, unlike the present case, did not involve two separate trucking companies using the same tractor during the lease period. In these cases there was also no dispute concerning whether the lessee was in control of the tractor at the time of the accident. If it was clear that Mr. Scott was operating for Presidential at the time of the accident, thus establishing control by the lessee, these cases would be more applicable. At the very least,

the contradictory evidence shows that a genuine issue of material fact remains as to whether, at the time of the accident, Mr. Scott was using the tractor in the scope of the lease agreement with Presidential.

Lastly, in section III. A. of this Opinion, this Court stated that it cannot grant AIC's Motion for summary judgment based on the theory that the bobtail policy does not cover the accident. Likewise, this Court cannot find that AIC is unquestionably liable under that policy. Genuine issues of material fact remain on the issue of whether the bobtail policy applies. Therefore, this Court cannot grant Action's Cross-Motion for summary judgment by utilizing the theory that AIC is liable under the bobtail policy and thus, Action is not liable. For these reasons, summary judgment is inappropriate.

IV. CONCLUSION

AIC's Motion for summary judgment must fail because a genuine issue of material fact remains concerning whether the exception to the bobtail policy applies in light of the dispute over which party controlled the tractor at the time of the accident. A genuine issue of material fact also remains regarding whether the bobtail policy would or would not be triggered in this factual situation. Similarly, Action's Cross-Motion for summary judgment must fail for the same reasons: genuine issues of material fact remain regarding who controlled

the tractor at the time of the accident and regarding whether the bobtail policy would apply in this situation.

An appropriate Order follows.

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| | : | |

ORDER

AND NOW, this 14th day of March, 2001, upon consideration of the Motion for Summary Judgment filed by Agricultural Insurance Company (Dkt. No. 25) and the Cross-Motion for Summary Judgment filed by Action Trucking, Inc. (Dkt. No. 26), and any Responses and Replies thereto, it is hereby ORDERED that:

- (1) the Motion for Summary Judgment is DENIED; and
- (2) the Cross-Motion for Summary Judgment is DENIED.

BY THE COURT:

ROBERT F. KELLY,

J.